No. 16047

In the United States Court of Appeals for the Ninth Circuit

COLUMBIA IRRIGATION DISTRICT, a corporation, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

STATE OF WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

Upon Appeals from the United States District Court for the Eastern District of Washington, Southern Division

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The district court did not write an opinion. A letter to counsel dated December 11, 1956, from the trial judge (the late Hon. Sam M. Driver) in which

his views are stated is printed in the appendix hereto, *infra*, pages 26-31. Findings of fact, conclusions of law and judgment by the district court appear in the record at pages 76-82.

JURISDICTION

These are appeals from a judgment entered by the district court on April 1, 1958 (R. 80-82). The jurisdiction of the district court was invoked by the United States under the Act of April 24, 1888, 33 U.S.C. sec. 591, and other statutes authorizing condemnation to acquire lands for the purpose here involved and appropriating funds therefor (R. 3). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the district court properly held that the appellants were not entitled to recover severance damages in the circumstances of this case.

STATEMENT

While this case originally involved other parcels of land and other questions, these appeals raise the single question as to whether the district court properly held that the appellants were not entitled to recover severance damages in the circumstances of this case to Parcel II consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T as described in Exhibit "A" to the amended complaint[1] (R. 19-52). It is be-

[1] The appellant Irrigation District raised a question at the trial concerning Tract J-473, or portion thereof, containing 9.7 acres of land, which was a continuation of a canal right

lieved that the facts in connection with that ruling may fairly be summarized as follows:

This proceeding was instituted by the United States in December, 1952, to acquire all right, title and interest of the Columbia Irrigation District in 3,479.73 acres of land for use in connection with the McNary Lock and Dam Project. Possession was granted effective March 31, 1953. An amended complaint was filed in December, 1954, to acquire the fee simple title to Parcel I consisting of 13 tracts of land and containing 132.42 acres; all right, title and interest of the Columbia Irrigation District in Parcel II (the parcel here involved) consisting of eleven segments containing 3,292.71 acres, as to which the United States had acquired fee or easement title by direct purchase or by condemnation from private owners other than appellant Irrigation District;[2] and perpetual easements for flowage purposes and for a drainage ditch over two tracts containing a total of 0.58 of an acre designated as Parcel III.

Appellant State of Washington is the holder of a

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of way immediately to the north of Tract J-484 in Parcel I. As it appeared in the original complaint Tract J-473 was eliminated and the 9.7-acre portion of the canal was incorporated into the Segment "J" description set forth in Parcel II of the amended complaint. Trial counsel has advised that because the canal right of way did not properly belong in Parcel II since it was land owned by the District, the court ruled that it would consider the complaint amended to incorporate Tract J-473 with the other Parcel I tracts. It was so valued.

[2] All assessments due the District to the date of the acquisition by the United States were paid in full.

bond issue of the appellant Columbia Irrigation District. Though the State had originally not been joined as a party, in December 1955 it was so joined and served with notice so that any claim it had as holder of the bonds could be adjudicated in the proceeding. A motion by the State that it be dismissed from the action as not a necessary or proper party was denied by the court.

Neither the appellant Columbia Irrigation District nor the appellant State of Washington held any "title, either legal or equitable, to the lands described as Parcel II herein or any part thereof" (Findings of Fact Nos. IV, V, R. 78). The lands described within Parcel II were as of the commencement of the action included within the boundaries of the Irrigation District and had, prior to their acquisition by the United States, been subject of assessment by the Irrigation District (R. 78).

Approximately 1,758 of a total of roughly 11,086 acres within the Irrigation District were taken in connection with the project here involved. Though it was stipulated "that the District owned no portion of said lands in Parcel II" (R. 75), the appellant Irrigation District claimed severance damages as a result of the taking in this case. Its theory was that the taking of land within the boundaries of the district left it with an oversized plant for the area to be served and hence a reduction in the value of its remaining assets. With the appellant Irrigation District having stipulated that it did not own the lands which had been acquired in Parcel II (R. 57-58, as corrected by stipulation dated Oct. 30, 1958 filed in

this Court, 73-74, 75), the Government contended that under *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820, no severance damages should be paid.

Accordingly, in June, 1956, the Government filed a petition for judgment as to Parcel II, praying, *inter alia*, that a decree be entered determining that neither the Columbia Irrigation District nor the State of Washington held any compensable interest in the lands described in Parcel II. At the hearing on the petition, the district court treated the Government's petition as a motion for summary judgment and there was raised the question as to whether factual issues had been presented which would prevent decision by summary judgment.[3] Under the date of October 9, 1958, a formal order was signed by the district court denying the Government's petition for judgment as to Parcel II.

Thereafter, by letter to counsel dated December 11, 1956 (appendix, *infra*, pp. 26-31), the district judge (the late Hon. Sam M. Driver) advised that he had reconsidered the Government's petition for judgment as to Parcel II and was prepared to rule upon that petition favorably to the Government's contention. A pertinent paragraph from that letter follows (appendix, *infra*, pp. 27-28):

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[3] The purpose of filing the petition was to secure a ruling by the court as to whether or not the Columbia Irrigation District or State of Washington had any compensable interest in Parcel II at the time of the taking and the petition was not intended as a motion for summary judgment.

On June 13, 1956, the plaintiff moved for summary judgment as to the property in Parcel II. The defendant irrigation district filed an affidavit resisting the motion. The court on the 9th day of October, 1956, entered an order denying the motion. As indicated by my comments when the motion was argued, I thought that factual issues had been raised by defendant irrigation district's affidavit which would prevent decision by summary judgment of the question whether the district has any compensable interest in Parcel II. At that time I expressed the opinion that the district did have such an interest. It seemed to me that the equities heavily favored the district and I may very well have been unduly influenced by that consideration. At any rate, I had misgivings which induced me to reexamine the question whether the district has any compensable interest in Parcel II. I have reread briefs of counsel and examined authorities cited, and I have come to the conclusion, reluctantly I must admit, that the district is not in law entitled to any compensation for the taking of the Parcel II lands. The conclusion is inescapable, I think, under United States v. Honolulu Plantation Co., 9 Cir., 182 F.2d 172. Judge Fee in his opinion for the court emphasizes the principle that an owner in a condemnation case may not recover so-called severance damage; that is to say, where less than the whole of a tract of land is taken, the diminution in value of the remainder by reason of the taking of the part, unless there is one fee owner-ship of the entire tract. Tract, of course, in this sense may mean noncontiguous parcels of land, provided they are used as a

unit in connection with a business or farming operation, or are capable of such use in the reasonably near future.

Pursuant to a suggestion by the court, in February 1957 a declaration of taking was filed and the sum of $6,779.00 was deposited as estimated just compensation for the taking of Parcels I and III. In response to further argumentative material from the Irrigation District upon the subject of its alleged compensable interest to Parcel II, the district court replied to the effect that it was still of the opinion previously announced that the Irrigation District had no compensable interest in Parcel II. A jury trial was waived and the question of valuation as to Parcels I and III was tried to the court.

The action came on regularly for trial on February 17, 1958 (R. 55, 76, 80). With respect to Parcel II the district court adhered to its ruling that neither the Columbia Irrigation District nor the State of Washington had a compensable interest in that parcel. Appropriate findings of fact, conclusions of law, and judgment were entered (R. 76-82).[4] Thereafter both the Columbia Irrigation District and the State of Washington filed notices of appeal (R. 82-84).

ARGUMENT

Introductory: The following facts should be borne in mind: Parcel II represents lands acquired by the

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[4] Appropriate findings of fact, conclusions of law, and judgment were also entered with respect to Parcels I and III. No appeal has been prosecuted with respect to those parcels.

United States by direct purchase or in other condemnation proceedings. The value of the Irrigation District's facilities was included in the enhanced value paid for the lands acquired from the individual owners (*United States* v. *Priest Rapids Irr. Dist.*, 175 F.2d 524, 531 (C.A. 9, 1949)) and all assessments due the Irrigation District to the date of acquisition of the land were paid in full. Consequently the United States has paid the full value of that land and any award to appellants would necessarily constitute the compelling of a payment in excess of fair market value. The want of merit in the appellants' attempts to have this Court upset the sound determination of the District Court that such excess payment is not required will now be shown.

I

Appellants Have No Contract Right To Any Payment

In Point II, *infra*, we show that the District Court was correct in its ruling in this case under well-established principles of law. In order, however, that this Court will not be led away from the true factual situation by statements appearing in the appellants' brief, we feel it advisable at the outset to show that much of appellants' argument has no valid basis in fact.

In what purports to be their factual statement of the case, appellants speak of an alleged attempted repudiation of an agreement on the part of the United States (Br. 2). This notion is many times adverted to by the appellants. For example, the first heading in the argument section of their brief is entitled "The

Government Should Be Estopped To Deny Its Agreement" (Br. 5). Over the course of the next few pages, the alleged "agreement" is referred to frequently (Br. 5-8).

The fact is, as was made clear to the trial court, that a written contract was contemplated which never reached the stage of being executed on behalf of the United States. There were valid reasons why such proposed agreement should not be ultimately accepted on the part of the United States, and the unassailable fact is that the agreement was never consummated.[5] The record makes this perfectly clear (R. 65-67).[6] Indeed, while appellants thereafter refer to the proposed agreement as though it were in fact a validly signed one, in their own "Statement of the Case and Questions Involved", appellants note that " * * * the agreement *was to be* signed by the 'Contracting Officer, Chief, Real Estate Division, Corps of Engineers, Walla Walla District.' " (Br. 2, Em-

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[5] For the information of this Court, in the course of the regular administrative review given to such proposed contracts on behalf of the United States, it was found that the basis of appraisals on which the amount of the proposed payment had been calculated was erroneous and that the difference between such appraisals and appraisals made on a proper basis was substantial. Consequently, the proposed agreement was not made. While it is believed that ample legal authorities support the contention of the United States in this respect, the phase of the case involving this matter is not on appeal and need not be considered by this Court. Hence, further detailing of the matter is unwarranted.

[6] The proposed agreement, unexecuted on the part of the United States, was marked for identification as Defendant's Exhibit No. 1 (R. 67).

phasis added). They do not—and, of course, cannot properly—allege that the proposed agreement was ever signed by that official or anybody else authorized to bind the United States. The protection of the public interest is the very reason why proposed contracts to bind the public purse are required to be in writing and to go through established review procedure before the United States is bound by the affixing of the signature of the official authorized to sign the proposed contract.[7]

As to appellants' frequent references to estoppel, in their attempt to bind the United States by this unauthorized contract, it is too well settled by the Supreme Court and applicable decisions of this Court that the principle of estoppel does not apply against the United States in such situations as here presented to warrant discussion of the cases relied upon by the appellants (Br. 5-8). E.g., *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947); *United States* v. *California*, 332 U.S. 19, 40 (1947); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 334 (C.A. 9, 1956), cert.

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[7] In *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 337 (C.A. 9, 1956), cert. den. 352 U.S. 988, a case involving another irrigation district in the State of Washington, this Court takes occasion to note as being worthy of criticism a failure, prior to approval of a proposal, to obtain legal advice "as to the validity or the advisability of the proposed agreement." In that case the written agreement had actually been signed and it was there ultimately held to be within the authority of the Government officials who approved it.

den. 352 U.S. 988; *Jones* v. *United States*, 195 F.2d 707, 709-710 (C.A. 9, 1952); *United States* v. *Walker Irr. Dist.*, 104 F.2d 334, 339 (C.A. 9, 1939); *Chanslor-Canfield Midway Oil Co.* v. *United States*, 266 Fed. 145, 150 (C.A. 9, 1920). As these cases make clear, estoppel does not apply against the Government even though the case presents phases of hardship. See particularly *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. at pages 383-384. Indeed, an administrative determination, even when spelled out in a letter, does not constitute an estoppel against the Government. *Walker-Hill Co.* v. *United States*, 162 F.2d 259, 263 (C.A. 7, 1947), cert. den. 332 U.S. 771.

II

Under Well Established Principles The District Court Was Correct In Its Ruling In This Case

Initially, another basic fallacy is present in the appellants' case. Thus, they would have it appear that there is something inconsistent in the fact that it was held that they had no compensable interest but that it was held that "All right, title and interest of the Columbia Irrigation District, a municipal corporation, defendant herein, in and to the lands in Parcel II—are hereby held and confirmed to have vested in the United States of America." (Br. 10). The appellants, in effect would read into their being named parties defendants an acknowledgment of some compensable interest. Thus they state (Br. 17): "As mentioned above, had the District had no right, title or interest in the lands in Parcel II there would be no reason to institute this proceeding, nor would

there be any purpose in entering judgment." (See also Br. 3, 10). But this completely overlooks the fact that in order to quiet its title and remove clouds therefrom, the United States with some frequency names as defendants in condemnation actions parties whom it contends have no compensable interest. E.g., *United States* v. *San Geronimo Development Co.*, 154 F.2d 78, 82-83 (C.A. 1, 1946), cert. den. 329 U.S. 718; *United States* v. *10,245 Acres of Land, more or less, in Grant County, Washington*, 50 F.Supp. 470 (E.D. Wash. 1943). This is particularly so in situations, such as here presented, where the United States has previously acquired the fee title either by purchase or condemnation from the former owners [8] (R. 57, 58 as amended by stipulation dated Oct. 30, 1958 filed in this Court, 73-74, 78). And since it was found as a fact that the United States had acquired fee estates "by condemnation or direct purchase, from their said owners" and that neither the Columbia Irrigation District nor the State of Washington, appellants herein, held any title, either legal or equitable, to any part of the lands described as Parcel II (Findings of Fact IV, V (R. 78)), it was particularly appropriate here for the judgment to

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[8] Indeed, in the instant case, in an affidavit filed in the District Court on June 13, 1956, Max K. Tysor, Chief, Real Estate Division, Walla Walla District, Corps of Engineers, deposes, *inter alia*, as follows: "This proceeding as to Parcel II was commenced for the sole purpose of clearing the title to the lands included in said parcel and the filing of this proceeding is not intended to in any way admit that said defendants hold any interest in said property or are entitled to any payment of compensation herein."

quiet the Government's title by stating expressly that "All right, title and interest of the Columbia Irrigation District * * * in and to the lands in Parcel II * * * are hereby held and confirmed to have vested in the United States of America." (R. 82).

A. *Severance damages were properly excluded in this case.* Going more to the merits, the claim of the appellants is that severance damages should have been awarded as a result of the taking of Parcel II lands in this case and that the District Court committed reversible error in failing to award such damages. But, under the facts of this case, the prime requisite for application of the so-called severance damage rule is not met. For the rule to apply, only part of a tract of land in one ownership must have been taken so that a residue remains which has been diminished in market value. In such a case, just compensation for the taking includes the lessened value of the residue. E.g., *Bauman* v. *Ross*, 167 U.S. 548, 574 (1897); *United States* v. *Grizzard*, 219 U.S. 180, 183 (1911); *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820. In the last-cited case, this Court expressly stated that (pp. 175-176): "The rule applies exclusively to condemnation of fee simple title of a tract in one ownership."

In the instant case it is beyond cavil that the Parcel II lands were not a part of one ownership with lands involved in Parcels I or III. This is so both by express finding of the District Court and by stipulation of the appellant Columbia Irrigation District. Thus, "At the time of commencement of this action and thereafter, defendant Columbia Irrigation Dis-

trict, a municipal corporation, held no title, either legal, or equitable, to the lands described as Parcel II herein or any part thereof." (Finding of Fact IV, R. 78). Similarly, "At the time of the commencement of this action and thereafter, the defendant State of Washington held no title, either legal or equitable, in and to the lands described as Parcel II herein, or any portion thereof; * * *" (Finding of Fact V, R. 78).[9] And the record makes clear that it was stipulated that "the District owned no portion of said lands in Parcel II" (R. 75). Since the appellants "owned no portion" of the lands in Parcel II, such lands obviously were not the residue of a larger tract in one ownership and so the severance damage rule has no application. *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172, 175-176 (C.A. 9, 1950), cert. den. 340 U.S. 820.

While what has been stated is believed adequately to answer appellants' argument, it is submitted that analysis of decisions relied upon by the appellants and of decisions of this Court, particularly in the *Honolulu Plantation Co.* case, *supra*, remove any doubt as to the correctness of the judgment of the District Court in this case. Thus, the fallacy of attempting to apply the theory, of "severance damages" to the circumstances of the Columbia Irrigation District lies primarily in the fact that the District has parted with no property right as to Parcel II, and yet seeks to recover compensation for the "severance" of lands not owned by it. *Baetjer* v. *United States*,

[9] The sole interest of the State of Washington in this case is as holder of the bonds of the Columbia Irrigation District.

143 F.2d 391 (C.A. 1, 1944), cert. den. 323 U.S. 772, relied upon by the appellants (Br. 12), is inapposite since it deals with the taking of a portion of two parcels of land *all owned by the appellant*, a trust-holding company. It follows that in the proper case, the issue of decreased market value of a mill property by reasons of overcapacity, could become material if it could be established that such property, *singly-owned and operated as a unit*, was so affected by a partial taking from the ownership.[10]

Rather than the *Baetjer* case, the circumstances of the Columbia Irrigation District fall within the rule of *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820. The latter case illustrated the same contention, i.e., a claim for "severance damages" because of loss of value of defendant's properties as an operating concern by reason of condemnation of property held in fee by third parties creating a shortened supply of raw materials resulting in an overcapacity of defendant's sugar mill and refinery. The company owned a very small part of the land supplying the cane, the greater portion of which came from lands neither owned or leased by it. After making the statement previously referred to (*supra*, p. 13) that "The rule applies exclusively to condemnation of fee simple title of a tract in one ownership.", this Court there went on to state that "Since Plantation had no

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[10] In this connection, the District Court stated: "The case of Baetjer v. United States, 1 Cir., 143 F.2d 391, I think, is distinguishable * * *. Even if there were a conflict between that case and Honolulu Plantation case, decided by the Ninth Circuit, the latter would govern." (Appendix, *infra*, p. 28).

property interest in the lands condemned, this claim is for business losses." (182 F.2d at p. 177) which were then shown, by citation of numerous authorities (ibid. fn. 9), to be plainly nonrecoverable.

Because of its pertinency, one further quotation from the opinion in the *Honolulu Plantation Co.* case should be made. There this Court said (182 F.2d at pp. 178-179):

> The rule requiring compensation for loss in market value of the remainder of the tract is applied strictly only where there is but *a single parcel owned by one party in fee simple.* An extension of the doctrine permitted the inclusion of another parcel *in the same ownership* if it lay contiguous to the principal tract. * * * With some reluctance the courts have held that the owner of *one parcel in fee* may be compensated for loss in market value thereof as a result of the taking of another parcel *owned in fee by him,* even if the latter is not contiguous, provided that, by actual and permanent use, a unitary purpose is served by both parcels. * * (Emphasis added).

These principles were but recently reemphasized by this Court by quotation of the above language in *Cole Investment Co.* v. *United States,* 258 F.2d 203, 205 (1958). In the words of the District Court: "The district is not entitled to so-called severance damage by the clearly stated principles announced in the Honolulu Plantation Company case." (Appendix, *infra,* p. 28).

Since appellant Columbia Irrigation District and appellant State of Washington "held no title, legal or

equitable" to the lands described as Parcel II (Findings of Fact IV, V, R. 78) and, in fact, it was so stipulated (R. 75), it is unnecessary for the United States to rely upon the cases, including some cited by this Court in the *Honolulu Plantation Co.* case (182 F.2d at p. 179, fn. 23), which spell out that interests short of actual ownership (*State* v. *Superior Court for Spokane County*, 10 Wash. 2d 362, 371, 116 P.2d 752, 756 (1941); *McIntyre* v. *Board of County Com'rs*, 168 Kan. 115, 118-121, 211 P.2d 59, 63-64 [11] (1949)) or different interests in different parcels (*Conness* v. *Indiana, I. & I. R. Co.*, 193 Ill. 464, 470-471, 62 N.E. 221, 223 (1901); *Glendenning* v. *Stahley*, 173 Ind. 674, 683-684, 91 N.E. 234, 238 (1910); *Tillman* v. *Lewisberg & N.R. Co.*, 133 Tenn. 554, 182 S.W. 597 (1916); *Duggan* v. *State*, 214 Iowa 230, 233, 242 N.W. 98, 99 (1932)) do not warrant recovery of severance damages. However, those cases fully support the judgment of the District Court which is here challenged.

And since the appellants held no estate in the lands described in Parcel II and such lands are in no way a residue of property owned by the appellants, the

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[11] This case summarizes the principle involved as follows (168 Kan. at pp. 120-121, 211 P.2d at p. 64): "The theory of compensation in eminent domain cases is that the owner is to be compensated fully for all land taken from him, including the diminution in value of that remaining owned by him, but full compensation does not include diminution in the value of the remainder caused by the acquisition of adjoining lands of others for the same undertaking. See Annotation at 170 A.L.R., beginning at page 721; also *State, ex rel Wirt*, v. *Superior Court*, 10 Wash. 2d 362, 116 P.2d 752."

issues as to Parcel II are clearly severable and could properly be determined separately as a matter of law.

B. *Future assessments are not liens against the land involved because lands belonging to the United States are not taxable.* In relying upon the decision in *United States* v. *Aho*, 68 F.Supp. 358 (D. Ore. 1944) the appellants have necessarily departed from the apparent basis of their claim for compensation, i.e., the theory of "severance damage", for the theory of a lien upon the lands within Parcel II for future assessments. This follows since the *Aho* ruling is to the effect that the lands within a drainage district, regardless of acquisition by the sovereign, remain liable to future assessment under Oregon law. In the *Aho* case, and its companion, *United States* v. *Florea*, 68 F.Supp. 367 (D. Ore. 1945), this purported continuing liability is construed to be a common law lien, or burden running with the land.[12]

Insofar as the appellants rely on *United States* v. *Aho*, 68 F.Supp. 358 (D. Ore. 1944) or similar cases, it should be noted (1) that they are distinguishable from the present case; and (2) that, as construed by appellants, they are contrary to established and well-recognized principles. In any event the decisions in the *Aho* and *Florea* cases were interlocutory and not finally appealed since settlements were reached with the parties involved. Thus, it has been made clear by the Supreme Court that the United States cannot be

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[12] In the District Court the appellants also relied upon the *Florea* case and could possibly have in mind doing so again in any reply brief which they may file. For this reason, both the *Aho* and *Florea* cases are included in the discussion to follow.

held liable for future assessments. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89 (1933). The *Mullen* case was brought in the District Court for Idaho under the Tucker Act, by bondholders of improvement district bonds, to recover from the United States after Government acquisition of all the lands contained in the districts. After an analysis of the matter, the Supreme Court there concluded that the acquisition of the lands did not constitute a taking of the bondholder's property, but at most only frustrated future action by way of assessment for which recovery could not be had. It should be noted that in the instant case the State of Washington, as holder of a bond issue of the Columbia Irrigation District, is in the same position as the Mullen Benevolent Corp. in the case by that name. The bondholder State of Washington, or for that matter the Columbia Irrigation District, had no lien, other than for annual assessments, when levied, upon the lands within the district. It is submitted that the *Mullen* case completely covers the State of Washington as well as the Columbia Irrigation District in the case at bar. Decisions of other courts are to the same effect. E.g., *People of Puerto Rico* v. *United States*, 134 F.2d 267 (C.A. 1, 1943) cert. den. 320 U.S. 753; *Public Water Supply District No. 3* v. *United States*, 135 F.Supp. 887 (C.Cls. 1955). In view of the established nature of the law in this respect, the statement by the District Court was fully warranted that "Clearly, I think the district is not entitled to compensation for the loss of the right to assess the lands taken by the Government, and, indeed, the defendant

district does not appear seriously to so contend." (Appendix, *infra*, p. 28).

Before leaving the *Aho* and *Florea* cases, it should be noted that they are to be further distinguished from the present case. It appears that in those cases the lands taken continued to benefit from operation of the drainage and diking facilities involved, which is not the circumstance here.[13] Yet it was this feature which gave rise to the Oregon District Court's conclusion that the Government ought to be estopped from denying liability (*Aho*, p. 366) and that an obligation running with the land continued concurrently with continuing benefits received (*Florea*, p. 376).

Neither the Columbia Irrigation District nor the State of Washington has a valid lien on the lands in Parcel II. Statutes of the State of Washington are comparable to those of the State of Idaho reviewed in the *Mullen* case. The bonds are refunding bonds

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[13] Cf. Br. 14 where even the appellants' assertion is no stronger than that "* * * the Government, *at least potentially, may* benefit * * *" (emphasis added). As made clear in *Sharpe* v. *United States*, 112 Fed. 893, 897 (C.A. 3, 1902), affirmed 191 U.S. 341, "possibilities more or less remote" are not properly to be considered in this respect nor can testimony be "vague and speculative in character". And, in any event, it is now established that neither potential liens nor unused benefits are compensable here. *Mullen Benevolent Corp* v. *United States*, 290 U.S. 89 (1933); *Yoknapatawpha Drainage Dist. No. 2* v. *United States*, 242 F.2d 925, 927 (C.A. 5, 1957); *People of Puerto Rico* v. *United States*, 134 F.2d 267 (C.A. 1, 1943), cert. den. 320 U.S. 753; *People of Puerto Rico* v. *United States*, 131 F.2d 151 (C.A. 1, 1942), cert. den. 318 U.S. 775; *St. Louis* v. *Dyer*, 56 F.2d 842, 844 (C.A. 8, 1932); *United States* v. *83.94 Acres of Land in Newport County, R. I.*, 65 F.Supp. 843, 848 (D. R.I. 1946).

in the instant case and as such are a lien upon the *property of the District only* (RCW 87.22.220; 87.16.090; Br. 9) and the statutes do not provide that they are liens with respect to lands in individual ownership. Since it is clear in the instant case that the United States acquired fee title to the lands in Parcel II from individuals who were former owners and that neither of the appellants had any title, either legal or equitable to any part of the lands described as Parcel II (R. 57, 58 as amended by stipulation dated Oct. 30, 1958, 73; Findings of Fact IV, V (R. 78)), it is clear that we are not here "dealing with an actual present lien, as contrasted to an inchoate lien" as the appellants would have it appear (Br. 9). All that either of the appellants had so far as Parcel II lands are concerned was the possibility of future assessments which might eventually become a lien. As has been shown the law is settled that such potential liens are not compensable here (supra, pp. 19, 20). It should be noted that even the appellants recognize that under circumstances such as here presented an "inchoate lien of a bondholder has no standing in law" (Br. 9).

Further analysis of Washington statutes and cases support these conclusions. Thus, as to the lien of assessments, the Washington code provides that the assessment upon real property shall be a lien against the property assessed, from the 1st day of January in the year in which it is levied (RCW 87.32.100). Obviously, the legislature has provided for annual assessments and vesting of liens. This being true, there would be no assessment liens on the property

purchased after all delinquent and current assessments were paid, unless the assessment of maximum benefits were a valid levy and assessment of such amount against the individual tracts of land, with provision for payment therefor. But there is no clear statutory provision for or direction to this effect. Special assessments are in derogation of the common law, and statutes so providing must be construed strictly as against liability other than such as is clearly expressed. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89 (1933).

The bond obligation is a general corporate obligation for which all lands in the district are subject to assessment, except, of course, land owned by the United States which is not subject to assessment. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 91 (1933). The individual landowner is not entitled to a segregation of his share of the obligation at the time it is created, or at a later time, since the act makes no provision for segregation. *Roberts* v. *Irrigation District*, 289 U.S. 71, 73 (1933) and authorities there cited.

Since there appears no vested lien upon lands in private ownership for the bonded indebtedness, there exists no liability as to lands in Parcel II. Congress has not provided for lands of the United States to become subject to assessment for the irrigation district in this instance. In the absence of an act of Congress allowing lands of the United States to become subject to assessment, it has been uniformly held that such lands are not liable for special assessments for local improvements. *Mullen Benevolent*

Corp. v. *United States*, 290 U.S. 89 (1933); *Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643, 645-646 (1925); *United States* v. *Allegheny County*, 322 U.S. 174, 188-189 (1944); *Board of Directors* v. *Reconstruction Finance Corp.*, 170 F.2d 430, 431 (C.A. 8, 1948).

III

The District Court Was Warranted In Segregating The Issues Of Fact And Law As To Parcel II From Those Of Parcels I And III

The appellants would have it appear that the District Court committed reversible error in ruling that the issues of fact and law with respect to Parcel II could be segregated from those of Parcels I and III (E.g., Br. 4, 9-10). While what has been stated hereinbefore demonstrates the fallacy of appellants' contention, it is believed that the want of merit in it can be pointed up readily and briefly.

As has been shown (*supra*, pp. 13-18), this case clearly presents no true "severance damage" situation. Values of Parcel I and II are severable from the issues here presented, in that the claim of the appellants, based on loss of power to levy future assessments as to lands in Parcel II, is not a "severance damage" but simply amounts to a claim for business losses which, as the Supreme Court and other courts have made clear, are consequential and not compensable (authorities cited *supra*, pp. 19, 20). Thus considered, allegations of the appellants such as that the market value of remaining plant facilities and holdings of the Irrigation District have been depreciated by the taking; that the Irrigation Dis-

trict has no other sources of income available; that its facilities cannot be economically changed; and that additional lands are not available to replace Parcel II lands (E.g., Br. 2-3, 10), all become issues of fact immaterial to this proceeding. The Supreme Court has repeatedly stressed that "Frustration and appropriation are essentially different things." *Omnia Co.* v. *United States*, 261 U.S. 502, 513 (1923); *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94-95 (1933); *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281-283 (1943). Since there was only a right of assessment so far as Parcel II lands are concerned, which right could not be exercised against government-owned lands, a judgment of no compensable damages to the appellants was properly entered so far as Parcel II is concerned.

If, as has been demonstrated herein, compensation cannot be allowed the Irrigation District or its bondholder under the theory of severance damages, it follows that the claims of the District as to Parcels I and III on the one hand, and on the other hand as to Parcel II, cannot be inter-related. Thus the District Court was warranted in considering the claims as to Parcel II separately and apart.

In view of the presentation of the appellants' case, a short quotation from the opinion of the United States Court of Appeals for the Eighth Circuit in *St. Louis* v. *Dyer*, 56 F.2d 842 (1932) becomes appropriate. There it is stated (p. 845):

> Much has been said in brief and argument respecting the "natural equity and justice" of

> appellant's claim. The trial court, keenly alive to this consideration in view of the great difficulties in the way of other relief, was, however, "unable to find any law to jump with my personal wishes in the case." * * *

In the instant case, while expressing some sympathy for the Irrigation District, the District Court recognized that the law was as contended by the United States. It is believed that this Court will come to the same conclusion.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

DALE M. GREEN,
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Spokane, Washington.

RONALD R. HULL,
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Washington 25, D. C.

DECEMBER 1958

APPENDIX

CHAMBERS OF
SAM M. DRIVER
UNITED STATES DISTRICT JUDGE
Spokane 10, Washington
December 11, 1956

Honorable William B. Bantz

United States Attorney
Post Office Building
Spokane 10, Washington

Attention: Mr. Ronald R. Hull
Ass't U. S. Attorney
222 Federal Building
Yakima, Washington

Mr. James Leavy, Attorney
P. O. Box 673
Pasco, Washington

Gentlemen:

Re: United States v. Columbia Irrigation District, et al.—No. 765 (So. Div.)

In the above case, the plaintiff, United States, is taking for public use certain lands described in the complaint. The action was instituted on December 23, 1952, and on March 18, 1953, the court entered an order giving the plaintiff the right to take possession of the premises to be acquired. There are three classes of real property involved which are separately listed in the complaint as Parcels I, II, and III. Parcels I and III consist of real property owned by the district and subject to lien rights of the State of Washington as holder of the district's bonds. Par-

cel II consists of privately owned land within the boundaries of the irrigation district previously acquired by purchase or by condemnation by plaintiff, United States.

On June 13, 1956, the plaintiff moved for summary judgment as to the property in Parcel II. The defendant irrigation district filed an affidavit resisting the motion. The court on the 9th day of October, 1956, entered an order denying the motion. As indicated by my comments when the motion was argued, I thought that factual issues had been raised by defendant irrigation district's affidavit which would prevent decision by summary judgment of the question whether the district has any compensable interest in Parcel II. At that time I expressed the opinion that the district did have such an interest. It seemed to me that the equities heavily favored the district and I may very well have been unduly influenced by that consideration. At any rate, I had misgivings which induced me to re-examine the question whether the district has any compensable interest in Parcel II. I have reread briefs of counsel and examined authorities cited, and I have come to the conclusion, reluctantly I must admit, that the district is not in law entitled to any compensation for the taking of the Parcel II lands. The conclusion is inescapable, I think, under United States v. Honolulu Plantation Co., 9 Cir., 182 F. 2d 172. Judge Fee in his opinion for the court emphasizes the principle that an owner in a condemnation case may not recover so-called severance damage; that is to say, where less than the whole of a tract of land is taken, the diminution in value of the remainder by reason of the taking of the part, unless there is one fee ownership of the entire tract. Tract, of course, in this sense may mean

noncontiguous parcels of land, provided they are used as a unit in connection with a business or farming operation, or are capable of such use in the reasonably near future.

In this case, I can conceive of only two theories on which the irrigation district would be entitled to compensation; namely, 1) the loss of right to continue to assess the lands taken by the Government after the taking; or, 2) so-called severance damage—that is to say, the reduction in value of the irrigation plant and system resulting from the taking of the privately owned Parcel II lands. Clearly, I think the district is not entitled to compensation for the loss of the right to assess the lands taken by the Government, and, indeed, the defendant district does not appear seriously to so contend. The District is not entitled to so-called severance damage by the clearly stated principles announced in the Honolulu Plantation Company case. The cases on which defendant district relies are either district court decisions, or are factually distinguishable. The case of Baetjer v. United States, 1 Cir., 143 F.2d 391, I think, is distinguishable, as pointed out on page 6 of the plaintiff's memorandum of authorities. Even if there were a conflict between that case and the Honolulu Plantation case, decided by the Ninth Circuit, the latter would govern.

I have carefully reexamined the opposition affidavit, and feel that it raises only one issue of fact which would prevent deciding the question as to Parcel II on the motion for summary judgment. There are circumstances related which would probably raise the issue of estoppel as to an individual, or a private corporation, but when it acts in its sovereign capacity to acquire private property for public use, the Gov-

ernment ordinarily is not subject to estoppel because of the acts or omissions of its officers and agents. But it is stated on page 5 of the affidavit, on information and belief, that, a contractual agreement was reached between the irrigation district and the Government under which the plaintiff agreed to pay, and is obligated to pay, the district $149,000 for all of the lands involved in the action. I seem to recall that Mr. Hull in a conference which he had in Walla Walla in open court, made the statement that the contract which had been drafted and apparently signed by the officers of the irrigation district, had never been signed by any representative or agent of the United States, and hence had never ripened into a completed contract. However, I do not have the court reporter's transcription of the proceedings at Walla Walla, and there is nothing in the file on which I could make a factual assumption, based on Mr. Hull's statement. If the plaintiff's counsel desire me to reconsider the matter of summary judgment, and it is a fact that the contract was never signed on behalf of the Government, it seems to me that an affidavit to that effect in support of the motion for summary judgment would be sufficient to dispose of the apparent factual issue on that point.

It is my view, also, that Parcel II lands present an entirely different question from the lands in Parcels I and III, and that the court could have a separate hearing or trial as to Parcel II. The plaintiff, in accordance with its customary practice, has endorsed on the complaint a demand for jury trial on the issue of just compensation. The issue with which the court is immediately concerned as to Parcel II, is not the amount of compensation that should be awarded to the owner of the property, but, whether the de-

fendant irrigation district has any compensable interest therein at all. That issue, I think, should be decided by the court without a jury, as Condemnation Rule 71A provides for a trial by jury as to the issue of just compensation only.

On examining the files in this case, I can find no declaration of taking, and no evidence that any deposit has been made into the registry of the court covering the estimated value of the property to be acquired. As stated above, the plaintiff has taken possession under an order of the court, but the title and ownership of these lands have at all times remained in defendant district, although the district has been denied any beneficial use of them, at least since the order of possession was entered in March, 1953. This would seem to place the district in an unfair, disadvantageous position, particularly as to the matter of carrying any appeal to the Ninth Circuit Court of Appeals on an adverse decision as to Parcel II lands. Frankly, I think that in all fairness, the Government should promptly, with or without filing a declaration of taking, deposit into the registry of the court an amount estimated in good faith to represent just compensation for the property in Parcels I and III. In that connection, I call attention to Civil Rule 71A (j), which in part provides that, the plaintiff shall deposit with the court any money required by law as a condition to exercise of eminent domain and, although not so required, may make a deposit when permitted by statute.

If it does not prove to be possible to set up the facts without dispute, so that the question as to Parcel II may be decided on summary judgment, then I propose to have a separate trial and hearing as to that parcel before the court without a jury. I should

welcome an expression by counsel as to whether they would prefer that such hearing be held before, after, or at the same time as the jury trial to determine just compensation as to Parcels I and III. I should think no extended trial would be necessary as to Parcel II. It should be possible to stipulate that the district does not own any fee simple, or other direct property interest in the lands of Parcel II, and that no enforcible contract for compensation has been entered into between the district and the United States, if that is the fact. To support its position, the defendant district could then make its offer of proof along the lines set out in the affidavit submitted on summary judgment, without the necessity of calling witnesses. If the Government does not see fit to make a deposit of estimated value (have in mind that a high percentage could then be withdrawn by the district on order of the court without prejudice), I would be inclined to defer passing upon the question presented by Parcel II, if the district so desires, until there has been a jury trial on Parcels I and III, and the award of compensation has been determined and paid into court.

I shall await your response to this letter before taking further action in this case.

Yours very truly,

/s/ SAM M. DRIVER
United States District Judge

SMD/b
cc- Attorney General
Attention: E. P. Donnelly, Assistant

Clerk, U. S. District Court

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